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In the Supreme Court of the United States

OCTOBER TERM, 1994

SOCIÉTÉ D'ANALYSES ET D'ETUDES BRETONNEAU,
PETITIONER

v.

RESOLUTION TRUST CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ELLEN B. KULKA
General Counsel

ANDREW B. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Assistant General Counsel

JEFFREY EHRLICH
Counsel
Resolution Trust Corporation
Washington, D.C. 20403

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's grant of summary judgment in favor of the RTC.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Ashe v. *Corley*, 992 F.2d 540 (5th Cir. 1993)	5
Bank of Marin v. *England*, 385 U.S. 99 (1966)	7
Celotex Corp. v. *Catrett*, 477 U.S. 317 (1986)	5, 6, 7
Cristobal v. *Siegal*, 26 F.3d 1488 (9th Cir. 1993)	6
Dobbs v. *Zant*, 113 S. Ct. 835 (1993)	8
Henry v. *Gill Indus., Inc.*, 983 F.2d 943 (9th Cir. 1993)	6, 7
Texas Commerce Bank-Hurst, N.A. v. *United States*, 703 F. Supp. 592 (N.D. Tex. 1988), aff'd, 896 F.2d 152 (5th Cir. 1990)	7
Ticor Title Ins. Co. v. *Brown*, 114 S. Ct. 1359 (1994)	8
United States v. *Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991)	5
United States v. *Wilson*, 881 F.2d 596 (9th Cir. 1989)	6

Rules:

Fed. R. Civ. P.:	
Rule 56	5, 6, 7
Rule 60(b)	3, 4
D. Ariz. R. 11(i)	3, 4, 6, 7, 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is unpublished, but the decision is noted at 19 F.3d 1441 (Table). The opinions of the district court (Pet. App. C1-C3, D1-D14, and H1-H14) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1994. A petition for rehearing was denied on May 3, 1994. Pet. App. B1-B2. The petition for a writ of certiorari was filed on June 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Lincoln Savings and Loan Association deposited $8 million with petitioner in two transactions in 1985 and 1989.[1] Pet. App. H2; Gov't C.A. Br. 2. Lincoln was placed in conservatorship in April, 1989; it later failed, and was placed in receivership. Federal banking regulators chartered a successor institution, Lincoln Savings and Loan Association, F.A. (New Lincoln), which purchased Lincoln's assets. The Resolution Trust Corporation (RTC) was appointed conservator for New Lincoln, and filed this action against petitioner in April, 1990, to recover the $8 million in deposits. Gov't C.A. Br. 2; see C.A. Exe. Rec. 120. Petitioner's answer claimed a set-off arising from loan participation agreements between it and Lincoln, and asserted several counterclaims based on allegedly unsatisfied obligations under those agreements. Pet. App. H2.

In late 1991, petitioner's original law firm was permitted to withdraw without substitution of counsel. Pet. App. D2. Before withdrawing, the firm requested that the district court, the RTC, and the RTC's counsel send all documents and correspondence in the litigation to petitioner's current counsel. Petitioner's new counsel did not, however, file an appearance in the district court until June 29, 1992. *Ibid.* In the interim, he told the RTC's counsel in repeated conversations in late 1991 and early 1992 that he had not yet been asked by petitioner to enter an appearance in this litigation. *Ibid.*

On February 20, 1992, the RTC filed a motion to modify the district court's scheduling order, explaining that it intended to file a motion for summary judgment

[1] Petitioner is the French corporate successor to Société de Banque Priveé, which in turn was created in the restructuring of the former Saudi European Bank. Pet. 3.

within 30 days. Pet. App. D3. The RTC served the motion to modify by mailing a copy to petitioner at its Champs-Elysees address in Paris. Petitioner received the motion, and forwarded a copy to its current counsel. *Ibid.* It evidently did not, however, instruct counsel to enter an appearance in the lawsuit at that time. The RTC filed its motion for summary judgment on March 27, 1992, and served it by mail on petitioner at the same Champs-Elysees address. Petitioner contends that it never received that motion. In any event, it filed no opposition with the district court. *Ibid.*

Rule 11(i) of the district court's Local Rules of Practice (Pet. 3) provides that a party that fails to serve and file a response to a motion may be deemed to consent to the granting of the motion. In the absence of any response from petitioner, the district court on June 12, 1992, found the RTC's motion "well-taken" and granted it both as to the RTC's claim for the funds on deposit and as to petitioner's counterclaims. Pet. App. C2. Court personnel sent a copy of the order granting the motion to petitioner's counsel, even though he had not at that point entered an appearance. *Id.* at D3-D4.

On June 29, 1992, petitioner's counsel filed an appearance in the district court. Pet. App. D2. On July 22, 1992, petitioner filed a motion to vacate the summary judgment pursuant to Fed. R. Civ. P. 60(b), contending that its failure to respond to the motion for summary judgment was the result of "excusable neglect," and that it could present a meritorious defense. Pet. App. D4; see C.A. Exe. Rec. 126. After briefing and argument, the district court granted in part the motion to vacate. The court vacated its judgment on the RTC's claim in order to permit petitioner to argue that it was insulated from liability on pre-reorganization deposits by the "act of

state" doctrine. Pet. App. D10. Petitioner was not, however, permitted to re-open any other issue. *Ibid.*

Petitioner later moved to amend the court's order to permit it to raise other issues, including its set-off argument and counterclaims, but the district court denied that motion after argument. Pet. App. E1, F1; see C.A. Exe. Rec. 50-69 (transcript of hearing). The court set a briefing and discovery schedule that culminated in a new hearing on the RTC's motion for summary judgment in January, 1993. Pet. App. E1. On January 14, 1993, the district court rejected petitioner's arguments under the "act of state" doctrine, and again refused to consider its assertion that French law would recognize a right to set off the deposited funds against amounts allegedly owed under Lincoln's loan participation agreements. *Id.* at H1, H4, H7-13.

2. The court of appeals affirmed. Pet. App. A1-A9. The court noted that summary judgment under Local Rule 11(i) would be inappropriate if the movant's papers were insufficient or themselves revealed a genuine issue of fact for trial, but held that the district court had not abused its discretion in this case because "the RTC's papers were sufficient to support granting the motion, as the district court found." Pet. App. A4. Relying on its construction of Local Rule 11(i) in a prior case that determined that the rule, so construed, was consistent with the Federal Rules of Civil Procedure, the court in this case concluded that "it cannot now be said that the rule is unconstitutional." Pet. App. A4.

The court of appeals also rejected (Pet. App. A5) petitioner's argument that the district court's ruling reopening its judgment under Rule 60(b) was improperly limited in scope:

> Given the manner in which [petitioner] conducted this litigation before current counsel became of

> record, we are of the opinion that the district court, after it made its extensive analysis of the situation, could properly have denied any reopening of the first summary judgment. Thus, we fail to see how [petitioner] was prejudiced by the court's decision to open it only in part.

The court then proceeded to consider (Pet. App. A6-A9) petitioner's arguments under the "act of state" doctrine. Because it determined that "[t]he record does not establish that the French banking authority compelled [petitioner] to repudiate its obligations to the RTC," the court found no "act of state" that would preclude payment to the RTC, and therefore affirmed the district court's grant of summary judgment for the RTC on that issue. *Id.* at A8-A9.

ARGUMENT

Petitioner does not challenge the court of appeals' ruling on the merits of its claim under the "act of state" doctrine. Instead, petitioner argues that the court erred in affirming the grant of summary judgment against petitioner because the RTC's motion papers were inadequate under Fed. R. Civ. P. 56 and *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

1. Petitioner contends (Pet. 11-16) that the decision below conflicts with decisions from the Fifth and Eleventh Circuits, which state that a conclusory assertion that the opposing party has no evidence to prove its case is insufficient to discharge the moving party's initial burden on summary judgment. See *Ashe* v. *Corley*, 992 F.2d 540, 544 (5th Cir. 1993); *United States* v. *Four Parcels of Real Property*, 941 F.2d 1428, 1438 n.19 (11th Cir. 1991) (en banc); see also *Celotex*, 477 U.S. at 328 (White, J., concurring). Nothing in the court of

appeals' opinion suggests, however, that the Ninth Circuit takes a contrary view of the law.

Indeed, the court relied in this case (Pet. App. A4) on its prior decision in *Henry* v. *Gill Indus., Inc.*, 983 F.2d 943, 950 (1993), in which it held that under Rule 56

> The party opposing [a] motion [for summary judgment] is under no obligation to offer affidavits or any other materials in support of its opposition. Summary judgment may be resisted and must be denied on no other grounds than that the movant has failed to meet its burden of demonstrating the absence of triable issues.

Similarly, in *United States* v. *Wilson*, 881 F.2d 596 (9th Cir. 1989), the court made clear that "[t]he moving party 'bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.'" *Id.* at 601 (quoting *Celotex*, 477 U.S. at 323). There is no material difference between the standards announced in *Henry* and *Wilson* and those articulated in the Fifth and Eleventh Circuit cases cited by petitioner.[2]

2. In *Henry*, the court considered the same local rule applied by the district court in this case. In construing the rule so that it would not conflict with Rule 56, *Henry* held that a district court would "necessarily" abuse its discretion if it granted a motion for summary judgment under Rule 11(i) "where the movant's papers are insufficient to support that motion or on their face reveal a genuine issue of material fact." 983 F.2d at 950. The

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[2] *Cristobal* v. *Siegel*, 26 F.3d 1488 (9th Cir. 1993), upon which petitioner bases its Supplement to the Petition for Writ of Certiorari, is a routine application of *Henry*. See Supp. Pet. App. 8-9, 25-26.

court below quoted and applied the same standard in this case. Pet. App. A4.[3]

The RTC's position in this case was straightforward: it had deposited funds with petitioner, and it was entitled to their return. Pet. App. G2-G3; see generally *Bank of Marin* v. *England*, 385 U.S. 99, 101 (1966); *Texas Commerce Bank-Hurst, N.A.* v. *United States*, 703 F. Supp. 592, 594 (N.D. Tex. 1988) (depositor had right to direct disbursement of funds), aff'd, 896 F.2d 152 (5th Cir. 1990). The facts governing the deposit issue were undisputed; even now, petitioner does not take issue with any factual element relating to the RTC's basic claim.

Petitioner instead suggests (Pet. 14 n.3) that it was entitled to a set-off against the RTC's claim, or alternatively that it was entitled to recover on a counterclaim.[4] Under *Celotex*, however, the RTC was not required to *negate* the factual basis for petitioner's affirmative defenses, on which petitioner would have borne the burden of proof at trial, in order to prevail on summary judgment. 477 U.S. at 323. Instead, the RTC's motion "point[ed] out to the district court * * * that there [was] an absence of evidence to support the nonmoving party's case," *id.* at 325, and in addition observed that petitioner had not responded to the RTC's attempts at

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[3] As the court noted (Pet. App. A4), *Henry* also disposes of petitioner's argument (Pet. 16-17) that it was unconstitutional to apply Local Rule 11(i) where the RTC did not satisfy its initial burden under *Celotex*. *Henry* construed Rule 11(i) to require compliance with Rule 56 in the summary judgment context. 983 F.2d at 950. Thus, in granting and upholding summary judgment against petitioner, both courts in this case necessarily determined that the RTC's motion papers satisfied Rule 56 and the requirements of *Celotex*. Pet. App. A4, C2.

[4] As the district court determined (see C.A. Exe. Rec. 67), there was no substantial difference between petitioner's set-off defense and its counterclaims.

discovery of the factual basis for petitioner's set-off claim, and that the court's discovery deadline had passed. Pet. App. G3-G4. Under the circumstances, there was little more that the RTC could have done to indicate to the district court the lack of any material factual dispute on the counterclaim.

The district court therefore did not abuse its discretion in granting the RTC's motion under Rule 11(i), and the court of appeals correctly upheld that decision (Pet. App. A4) on the ground that "the RTC's papers were sufficient to support granting the motion" under the standard articulated in *Henry*. At most, petitioner's argument amounts to a claim that the court of appeals misapplied an accepted legal standard to the facts of this case. That claim merits no further review. See *Ticor Title Ins. Co.* v. *Brown*, 114 S. Ct. 1359, 1362 (1994); *Dobbs* v. *Zant*, 113 S. Ct. 835, 837 (1993) (Scalia, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ELLEN B. KULKA
General Counsel

ANDREW B. TOMBACK
Deputy General Counsel

MARK P. HILEMAN
Assistant General Counsel

JEFFREY EHRLICH
Counsel
Resolution Trust Corporation

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